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In the Court of Criminal Appeals of Texas
At Austin

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COURT OF CRIMINAL APPEALS
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No. 01-16-00768-CR
In the Court of Appeals
For the First District of Texas
At Houston

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No. 1487627
In the 338th District Court
Of Harris County, Texas

———♦———

Ruben Lee Allen
Appellant

v.

The State of Texas
Appellee

———♦———

State's Reply Brief Regarding State's Cross-Petition for Discretionary Review

———♦———

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The appellant's thorough discussion of separation-of-powers cases shows that prior to *Peraza* no Texas court believed that court costs implicated the separation-of-powers provision.

In his brief regarding the State's ground for review, the appellant has a thorough discussion of the major separation-of-powers cases in Texas jurisprudence. (App.'s Brief on State's PDR at 4-18). As the appellant notes, the holdings of this Court and the Supreme Court on the subject have been generally consistent in what constitutes a violation of the separation-of-powers provision.

The appellant then contends that this consistent interpretation "supports" this Court's opinions in *Peraza* and *Salinas IV*. To the degree that *Peraza* and *Salinas IV* use terminology from prior separation-of-powers cases, the appellant is, of course, correct, but that is little more than a tautology. The separation of powers is, at the margins, such a hazy principle that an awful lot of issues can be cast as separation-of-powers concerns. The relevant question here is whether the prior separation-of-powers cases compel, or even suggest, the *Peraza-Salinas* rule. They do not; those cases have nothing to say about when a "court cost" becomes a "tax."

A more insightful observation about the separation-of-powers cases is what they do not address. For well over a century defendants were forced to pay reimbursement court costs that were deposited into the general fund of the state.[1] During that period both the Supreme Court and this Court issued numerous opinions regarding the separation-of-powers provision. Yet it was not until *Peraza* that a court believed the separation-of-powers provision had any relevance to how the Legislature could spend court-cost money.

The State is not, as the appellant suggests, asking that court costs be grandfathered in as an accepted constitutional violation. The State is asking this Court to use the nineteenth-century court-cost scheme as a tool for interpreting what the separation-of-powers provision means and what constitutes a judicial function.

The appellant suggests that the State's use of historical statutes is all for naught because if collecting court costs for general revenue is unconstitutional, then it was unconstitutional in 1879 and remains unconstitutional now. (App.'s Brief on State's PDR at 25-26). The appellant quotes *Rochelle v. Lane*, 148 S.W. 558 (Tex. 1912) — a case

[1] In its original brief the State suggested that the requirement for defendants to reimburse the state for its expenses was eliminated in the code revision of 1965. This was incorrect. That requirement lasted until 1985. *See Curry v. Wilson*, 853 S.W.2d 40, 50 n.2 (Tex. Crim. App. 1993) (Clinton, J., dissenting) (discussing demise of this requirement in purportedly nonsubstantive revision of 1985).

whose import the State will discuss later — for the principle that "a disregard of the Constitution by the usurpation of power on the part of officials is not sanctified by its long continuance…." *Rochelle*, 148 S.W. at 560.

But the State is not arguing that court costs should be grandfathered-in as an exception to the constitution. The State is arguing that the court-cost statutes in effect at and around the time the Texas constitution was adopted provide valuable insight into what the framers and ratifiers of the constitution believed the separation-of-powers provision meant, and what functions judicial officers were allowed to perform. Justice Scalia summarized this theory of constitutional interpretation: "[W]here a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision." *National Labor Relations Board v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring).

For instance, in *Carroll v. United States*, 267 U.S. 132 (1925), the Supreme Court addressed whether a warrant was required to search an automobile. To interpret what the Fourth Amendment meant by a "reasonable" search, the court looked at historical legislation. *Carroll*,

267 U.S. at 150-53. Beginning with the First Congress and running into the twentieth century, Congress had passed several laws allowing the warrantless searches of movable things — ships, wagons, and carriages — and these laws had been enforced without question. The court did not declare that these statutes were acceptable exceptions to the Fourth Amendment because of their age; rather it used the historical practice as a tool for interpreting what constituted a "reasonable" search within the original meaning of the Fourth Amendment.

Nineteenth-century statutes show that both collecting court costs for the state's general revenue fund and ordering disbursements from the state's general revenue fund were considered appropriate judicial functions at the time the constitution was adopted.

Just as what the American Founders thought was a reasonable search is not obvious from the face of the Fourth Amendment, neither is it obvious from the face of the separation-of-powers provision what, exactly, those Texans who drafted and ratified the constitution believed were executive, legislative, or judicial functions. While some things might be obvious, at the margins it is necessary to look back at the rest of the constitution as well as the practice of the time.

It is apparent that the Texans of 1876 had a different notion of "judicial" functions than was evinced in the federal constitution. Article

V of the Texas constitution, establishing the "Judicial Department," establishes not only the court system as that term is commonly understood, but also numerous local officials whose duties are, outside of Texas, traditionally thought of as legislative or executive: commissioners' courts, district attorneys, county attorneys, constables, and sheriffs. And Article V creates the county judge, a Texas chimera who constitutionally exercises executive, legislative, *and* judicial powers.

At the time the constitution was adopted, all of the officials mentioned in Article V, except for judges and county commissioners, were explicitly charged with collecting various monies for both the state and the county, including court costs. TEX. CODE CRIM. PROC. art. 978 (1879). These officers were required to create reports of the monies collected and submit those reports, under oath, to either a district court (for monies collected for the state) or the commissioners' court (for monies collected for the county). TEX. CODE CRIM. PROC. arts. 975, 977 (1879). Although the money would be deposited with the county treasurer, the collection and accounting occurred entirely within the judicial department.

A related provision made a point that is highly relevant to this Court's court-cost jurisprudence: "The moneys required to be reported

embrace all moneys collected for the state or county other than taxes, but taxes are not included." TEX. CODE CRIM. PROC. art. 979 (1879). This is important because one of the essential bases for the *Peraza-Salinas* rule is the belief that court costs not dedicated to a criminal-justice purpose are actually "taxes." Old Article 979 shows that the Texans who drafted and ratified the current constitution distinguished court costs from "taxes" without concern for where the court-cost money went.[2]

Such was the judicial department's involvement with state finances that for felony cases judicial officers were able to obtain payment from the state with no meaningful executive involvement. For costs that the Code of Criminal Procedure declared would be paid for by the state government, officers submitted their bills to the district judge. TEX. CODE CRIM. PROC. art. 1057 (1879). If the district judge approved the bill, a copy would be sent to the state comptroller who

[2] A secondary inference from this article is that these judicial officers *did* collect "taxes," but they were not required to include those amounts in this particular report. That inference also shows that the *Peraza-Salinas* rule is not consistent with the original understanding of what functions "judicial" officers could perform.

would then pay the officer from a legislative appropriation[3] set aside for this purpose. TEX. CODE CRIM. PROC. arts. 1058, 1059 (1879).

Apparently some comptrollers of the era attempted to exert oversight over this process, which, intuitively, sounds like an executive function. Which gets back to a case the appellant discussed as a separation-of-powers case, *Rochelle*. There, the sheriff of Bowie County had submitted his bill to the district judge, who had approved it and forwarded it to the comptroller. *Rochelle*, 148 S.W. at 558. The comptroller, however, refused to pay for some of the items listed.[4] *Id.* at 352.

The Supreme Court issued mandamus relief in favor of the sheriff, holding that the comptroller was without authority to question the amount approved by the district judge. *Id.* at 560. The court treated this as a separation-of-powers issue of constitutional dimension. *Ibid.* That is, by questioning the sheriff's and judge's determination of how

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[3] The fact that the fees were paid from an "appropriation" rather than a dedicated fund is further evidence that court costs were not sequestered into criminal justice accounts as this Court now requires under the *Peraza-Salinas* rule.

[4] The sheriff had billed for summoning 1700 witnesses in only 17 cases. *Rochelle*, 148 S.W. at 560. The sheriff's total bill was $4,422.45. If there were only 17 felony cases, this is an average of $260.14 per case. Using the same method the State used to adjust historical amounts in its brief on the merits, this would be $6,997.88 per case in 2018 dollars. Any convicted defendant would have been obliged to reimburse the state government for any of the sheriff's services expended in his case.

much the state had to pay the sheriff — which would determine how much money the defendants would have to reimburse the state's general fund — the *comptroller* was impinging on a *judicial* function.

The fundamental belief underlying the *Peraza-Salinas* rule is that the collection of money for general revenue is a function that can be carried out only by an executive officer. This belief is inconsistent with the structure of the Texas constitution and the practice at the time that constitution was adopted. This Court should adopt an interpretation of the Texas constitution that is consistent with what the framers and ratifiers believed they were adopting. Under that original public meaning, courts may assess and collect legislatively-prescribed court costs that are then deposited into the general revenue fund, and the discretion of how to spend that money rests solely with the Legislature.

Conclusion

The State asks this Court to affirm the First Court's judgment on the basis that the Texas constitution's separation-of-powers provision does not impose stringent requirements on how recouped court-cost money is spent.

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